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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.
Petitioners,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners respectfully submit this reply brief in support of their Petition for Writ of Certiorari (the "petition").

I. INTRODUCTION

Respondents oppose review of the first question presented by the petition, claiming that to "allow competitors injured by a group boycott to pursue antitrust remedies" would require the Court to "carve out an exception to the antitrust injury" doctrine. (Opp. 22) This is a dangerous misstatement of the law and further demonstrates the need for review by this Court. See *Atlantic Richfield Co. v. USA Petroleum*, 495 U.S. 328, 339 (1990) ("*ARCO*") (instructing that an antitrust plaintiff injured by its competitors' joint "predatory" conduct would suffer "antitrust injury"). Unless certiorari is granted and the lower courts' decision vacated, all intended victims of *per se* unlawful predatory conduct could easily be denied redress. The clear result will be irreparable harm to competition — here, fraudulently induced settlement annuities and less annuity funded settlements of tort litigation.

Regarding the second question for review, respondents admit this Court has not "resolved the issue of applicability of *Colorado River* abstention to cases involving exclusive federal jurisdiction." (Opp. 24) Moreover, respondents' justification for denial of a federal court's discretion to abstain from adjudicating federal antitrust claims contradicts opinions of this Court and decisions from other Circuits and promotes the inefficient allocation of judicial resources.

Finally, respondents manipulate the *undisputed* record in order to fabricate issues of fact which do not exist. None of respondents' contentions is sufficient to preclude this Court's review of the important questions presented here.

II. ARGUMENT

A. Respondents' Claim, That A Direct Victim Of A *Per Se* Unlawful Group Boycott May Not Show "Antitrust Injury," Demonstrates The Need For Certiorari

Respondents boldly assert: "The Finding Below That The Direct Victim Of A Group Boycott Did Not Sustain Antitrust Injury Does Not Present A Radical Departure From Settled Legal Principles." (Opp. 20) This oxymoron — that a "direct victim" of an unlawful "group boycott" does not sustain "antitrust injury" — demonstrates the need for *certiorari* here for it shows how far respondents will go to bar admitted victims of admitted violations access to the courts. Respondents' nationwide group boycott, which deliberately excluded petitioners from the annuity brokerage market — cutting off access to critical information needed to compete (annuity rates) — was clearly "predatory." Moreover, a competitor excluded by a *per se* unlawful group boycott which respondents imposed so as to euchre injury victims out of adequate disability payments, consequently discouraging the voluntary settlement of injury claims, is injured by an "anticompetitive aspect" (*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)) of respondents' conduct and therefore suffers "antitrust injury."[1]

Respondents expressly admit that petitioners "indeed sustain antitrust injury if the restriction on competition flowing from the boycott extends beyond the excluded competitor [i.e., petitioners] to cause injury to consumers in the market through increased prices, decreased output or other restrictions on the market." (Opp. 22) But that consumer injury is precisely what petitioners have alleged and proven and is precisely the consumer injury which the Consumers Federa-

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[1] Significantly, respondents do not deny their conduct was a *per se* unlawful group boycott of petitioners or that respondents' boycott resulted in "over-priced" (Opp. 8) annuities (thus harming both tort plaintiffs *and* tort defendants) and a decrease in the number of structured settlement annuities that were sold.

tion of America stressed in its *amicus curiae* brief to this Court. Respondents cannot deny that obvious consumer harm, so they just assume it away. Petitioners readily acknowledge that every antitrust plaintiff must show antitrust injury, but that is not the question presented. The question here is whether petitioners satisfy that requirement, i.e., whether boycottees suffer injury "of the type which the antitrust laws" prohibiting boycotts "were intended to prevent." *Brunswick*, 429 U.S. at 489. The lower court's endorsement of respondents' contention that a victim of a group boycott cannot prove antitrust injury as a matter of law because the boycott victim's injury does not "flow from" injury to competition deserves this Court's review. (39 F.3d at 955; App. at A-7.)

Respondents would have this Court believe that "antitrust injury" law is fully settled and free of conflict and that lower courts have "consistently interpreted and applied the antitrust injury requirement." (Opp. 16) Yet contrast, for example, the lower court's decisions here with *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1947 (1992) (advertising brokers competed in relevant markets because they had the ability to take business from defendant and therefore suffered antitrust injury from their unlawful exclusion) and *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 295 (1992) (real estate broker suffered antitrust injury because he was excluded as competitor by a group boycott). The confusion and uncertainty engendered by the related doctrines of antitrust injury and standing continue to perplex the lower courts. This is exemplified most recently by the First Circuit's decision in *SAS of Puerto Rico v. Puerto Rico Tele. Co.*, No. 94-1711 (1st Cir. Feb. 21, 1995) (U.S. App. LEXIS 3298). Decrying this "confusion" among the Circuits in coping with the nettlesome "antitrust injury" requirement, the Court of Appeals observed:

> Despite its statutory framework, antitrust law is largely the handiwork of federal judges and antitrust enforcers,

> and the resulting case law offers much to admire. The corner of antitrust law with which we are concerned here is an exception. As one commentator has observed, 'the courts have never been able to create an intelligible theory of private antitrust standing capable of being applied across the full range of potential cases.' (citations omitted).

To defeat certiorari, respondents string-cite a batch of lower court decisions for the notion that courts routinely deny antitrust injury to intended victims of group boycotts (Opp. 16, 20). None of those decisions so holds. All of them merely held either that plaintiffs suffered no injury whatsoever (e.g., *OK Sand*) or that plaintiffs failed to show injury to consumers (e.g., *Stamakis*) or that plaintiffs failed to show injury to competition (e.g., *Les Schockley*). Here, petitioners have shown (and respondents do not deny) that respondents' admitted group boycott caused injury to both competitors and consumers and, since respondents' boycott is a *per se* violation, injury to competition (in the very market from which petitioners were excluded) is conclusively presumed (*FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990)).[2]

If the Court does not grant review of this important question, the lower courts' expansion of this Court's antitrust injury requirement will serve to bar competitor victims of group boycotts from the courts. Consumers, as well as competitors, will have thus lost the protection which Congress deemed important in passing the Clayton Act (15 U.S.C. § 15).

B. Respondents Now Disavow The *Undisputed* Facts Of This Case

Respondents stipulated to the facts alleged in the complaints for summary judgment purposes — including the fact that petitioners were successful competitors in the annuity broker-

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[2] Injury to competition was also demonstrated to the courts below by substantial evidence and was not disputed by the Ninth Circuit. (39 F.3d 954-955; App. at A-5, 7)

age market before the boycott. However, to the Ninth Circuit and now to this Court, respondents deny those facts in order to cling to the erroneous summary judgment they obtained. Respondents are estopped to disavow their stipulations and reverse their positions whenever it suits their purposes. *General Utils. & Operating Co. v. Helvering*, 296 U.S. 200 (1935) (Court of Appeals opinion summarily reversed because it decided an inference of fact directly in conflict with the parties' stipulation). They should not be allowed to thwart Supreme Court review by such tactics.

Thus respondents argued to the District Court initially that exclusion of petitioners from the annuity brokerage market alleged in the complaints was not "anticompetitive" because it may have benefitted tort defendants. Because the District Court showed an interest in an alternative theory at the initial hearing — i.e., that life insurance companies' annuity prices were "attorney work product" — respondents quickly switched to that argument. Although it was clear error, they succeeded. Then, in the Ninth Circuit and here, instead of defending their initial argument or even the one that prevailed in the District Court, respondents shifted again — now contending that petitioners were not even in the relevant market to sell or broker annuities — the very market from which respondents originally had *stipulated* petitioners were excluded.

Respondents' opposition also falsely depicts the relevant market to sell annuities as consisting only of tort defendant *brokers* — who may sell annuities — and tort plaintiff *consultants* — who may only advise tort plaintiffs regarding settlement but may not sell annuities to fund settlements. (Opp. 3-4) However, this reflects the status of the structured settlement annuity market only after respondents' successful boycott of petitioners as brokers and therefore reflects the effects of their boycott.[3] Respondents cannot use their unlawful boycott

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[3] Although the Ninth Circuit ultimately ignored these undisputed facts, it recognized that petitioners complained that respondents drove petitioners out of the "annuity *brokerage*" market. (39 F.3d 953; App. at A-3)

to exclude petitioners from the market and then cite petitioners' exclusion as proof that petitioners are not in the market and therefore suffer no antitrust injury.[4]

Respondents also seek to defeat review by contending that tort defendants, usually casualty insurers, are the sole "consumers" of annuities. (Opp. 8) Again, respondents are wrong. They ignore the fact that tort defendants do not receive the annuity payments and cannot purchase any annuity without tort plaintiffs' approval. Without tort injury victims, the market for this financial commodity which provides funds for long-term medical care simply would not exist. Tort plaintiffs "use" the annuities which tort defendants exchange in return for a release of the tort victim's injury claim. A "consumer" is defined as "one that *utilizes* economic goods," (Webster's Third New Int'l Dictionary, Unabridged (1976) (emphasis added)) or "one who uses up an article produced, thereby exhausting its exchangeable value," The Compact Edition of the Oxford English Dictionary, Volume 1 (1971). This term applies to tort plaintiffs, *not* tort defendants. At a minimum, both tort plaintiffs and tort defendants — who must agree to the purchase of a specific annuity in order to settle litigation — should be considered "consumers" of these annuities. *See, e.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (*both* patients and insurers were "consumers" of dental services).[5]

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[4] Respondents' argument that petitioners cannot suffer antitrust injury because they are mere "brokers" is also plain error. Courts routinely hold that "brokers," including advertising and real estate — if they compete in the relevant market — can sustain antitrust injury. *See, e.g., Yellow Pages, supra* and *Thompson, supra.*

[5] Moreover, respondents ignore the fact that both of these consumers (i.e., tort plaintiffs *and* tort defendants) are harmed by the boycott which undisputedly increased prices and decreased output. Respondents also ignore the substantial evidence that disclosure of accurate annuity price information to the injury victims often resulted in the placement of annuities which produced greater payouts to tort plaintiffs at *lower* premium cost to tort defendants.

Finally, contrary to respondents' unsupported allegations, the District Court's conclusion — that prices of an annuity sold by a third party and purchased by tort litigants only after they have agreed to settle their litigation constitute tort defendants' privileged or confidential "negotiating strategy" (Opp. 23) — is also wrong.[6] Respondents have no authority for their continuing assertion that third party life insurers' annuity prices constitute some inchoate property right of tort defendants.[7] Removal of this unfortunate precedent in the published District Court decision is another reason to review the decisions below.

Hence, contrary to respondents' opposition, this petition rests upon *stipulated* facts which allow the Court to address squarely the important legal issues at stake.[8]

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[6] After petitioners' state law claims were remanded by the District Court to state trial court, the state trial court examined the records of respondents' brokers and determined that life insurance companies' annuity prices were "a mere collection of data created and supplied by third party commercial enterprises [life companies] . . . [which do] not reflect any mental process, strategies, or impressions of defense counsel, or [a broker] . . . . [T]his factual data originating with a third party life insurer is *completely unprivileged.*" (Super. Court Order dated August 1, 1994 at 21:10-16) (Emphasis added).

[7] Further, respondents' depiction of brokers as only "allowed" to disclose annuity prices to tort plaintiffs with tort defendants' "approval" (Opp. 4) describes the inefficient market resulting from the boycott. Before the boycott, petitioners — or any structured settlement broker — could and did obtain annuity rates from life insurance companies on behalf of *either* tort plaintiffs or tort defendants.

[8] Space limitations preclude petitioners' detailed response to each of the alleged "misstatements" which respondents impute to petitioners. Respondents' claim, that petitioners distort the rulings below, is patently false.

C. Respondents Concede The Question Of Whether A Federal Court Has Discretion To Abstain From Deciding "Exclusive Jurisdiction" Claims Is Both Unresolved And Important

Respondents admit "this Court has not finally resolved the issue of applicability of *Colorado River* abstention to cases involving exclusive federal jurisdiction." (Opp. 24) Nor do respondents dispute the substantial importance — to the doctrine of abstention generally — of determining whether courts having exclusive jurisdiction nonetheless also have discretion not to adjudicate claims if the circumstances warrant. Hence the important and discrete legal issue presented by this petition is not (as respondents imply) whether the District Court abused its discretion in refusing to abstain but whether the Ninth and Seventh Circuits, in contrast with other Circuits, are correct in concluding that district courts have no discretion to even *consider* abstention as to any claims within their "exclusive" jurisdiction.[9]

Respondents summarily dismiss, as "not persuasive" (Opp. 25), authorities cited by petitioners which demonstrate there is a split of authority both within and among the Circuits regarding whether district courts have such discretion. However, as the most recent cases on this issue indicate, opinions of this Court and other Circuits plainly suggest that courts do possess requisite discretion to abstain from adjudicating exclusive jurisdiction claims in appropriate circumstances.[10]

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[9] Respondents also minimize the importance of this issue by falsely characterizing petitioners as "forum shoppers" even though respondents do not dispute they originally agreed with petitioners and stipulated in the District Court to stay these "exclusive" claims in the interests of judicial efficiency.

[10] *See, e.g., Allied Machinery Ser., Inc. v. Caterpillar Inc.*, 841 F. Supp. 406 (S.D. Fla. 1993), and *Lorentzen v. Levelor Corp.*, 754 F. Supp. 987 (S.D.N.Y. 1990). These decisions cite *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978); *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942); *Klein v. Walston & Co.*, 432 F.2d 936 (2d Cir. 1970); *Motolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949) (L. Hand, C.J.); *Kartell v. Blue Shield of Mass.*,

The essence of respondents' argument is that review should be denied because Congress decreed Sherman Act claims within a federal court's "exclusive," rather than "concurrent." jurisdiction. (Opp. 26) Again, respondents are wrong.[11] Respondents also miss the mark when they argue that a "substantial doubt" as to whether the state court will finally resolve the issues between the parties justifies denial of review. *First:* this contention ignores the basic question of whether discretion exists. *Second:* it contradicts the state Court of Appeal decision. *See, e.g., Manufacturers Life Ins. Co. v. Superior Court*, 27 Cal. App. 4th 67, 84 (1994), review pending (App. at A-51) (ruling that, if respondents' denial of state court jurisdiction over petitioners' antitrust claims were to prevail, California would "stand alone in opposition to general law throughout the country"). Respondents' argument thus begs the important question presented, ignores judicial comity and promotes the inefficient allocation of federal (and state) courts' resources.[12]

Inc., 592 F.2d 1191 (1st Cir. 1979), which support their conclusion that federal courts have discretion to abstain from adjudicating claims within their "exclusive" jurisdiction. The decision below, as well as those in the Seventh and Second Circuits, concededly disagree with the decisions cited above. However, that is good reason to grant-not deny-review.

[11] *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 471 (1990) (J. Scalia, concurring) declared there is "less than compelling" reasons for considering Sherman and Clayton Act claims as "exclusive" since Congress did not expressly confer exclusive jurisdiction); J. Rehnquist, *Taking Comity Seriously: How To Neutralize The Abstention Doctrine*, 46 Stanford L. Rev. 1049, 1102 (1994) (describing the "dubious nature" of federal court's "obligation" to exercise jurisdiction).

[12] Respondents are wrong that petitioners' federal antitrust claims would still have to be adjudicated after petitioners' state antitrust claims have been adjudicated in state court. *Marrese v. American Acad. of Orthopaedic Surg.*, 470 U.S. 373, 386 (1985); *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1437 (9th Cir. 1985).

III. CONCLUSION

For the reasons stated above and in the petition, the writ of certiorari should issue with regard to both questions presented.

Respectfully submitted,

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